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Due Process, Supreme Court, Genesee County: Daniel S. v. Dowling

accept defendant's letter of authorization, permitting it to tow trucks from the Thruway, it also accepted the defendant's terms,[237] including the defendant's right to revoke authorization without prior notice.[238]

The federal and state law both accord governmental agencies great discretion and authority in promulgating rules and procedures relating to government contracts or programs. In order to succeed on a due process claim, the plaintiff must demonstrate that he has a property interest.[239] Such property interest is derived not from the Federal or State Constitutions, but from an independent source such as state law or other authority.[240] However, when an agency retains significant discretion over participation in a government program, the plaintiff will be subject to the terms of the contract it signed with the government agency.[241]

SUPREME COURT

GENESSEE COUNTY

Daniel S. v. Dowling[242]
(decided April 28, 1997)

In February 1994, petitioner Daniel S., a ten year old boy was allegedly abused by his father, who was separated from his mother.[243] The Statewide Central Register of Child Abuse and Maltreatment [hereinafter "SCR"] was notified and an investigation was made according to the regulatory procedures.[244] This action was filed on Daniel's behalf, pursuant to Article 78 of

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[237] *Id.* at 86, 652 N.Y.S.2d at 807.
[238] *Id.* at 83, 652 N.Y.S.2d at 805.
[239] *Loyal Tire*, at 82, 652 N.Y.S.2d at 806.
[240] *Loyal Tire*, at 86, 652 N.Y.S.2d 804, 806-07.
[241] *Id.*
[410] 172 Misc. 2d 619, 660 N.Y.S.2d 288 (Sup. Ct. Genessee County 1997).
[243] *Id.* at 620, 660 N.Y.S.2d at 290.
[244] *Id.*

New York Civil Practice Law and Rules [hereinafter "CPLR"],[245] contending that the regulatory provisions do not afford him due process, and that the review undertaken here also did not provide due process.[246]

After a hearing on these issues, the court held that the regulatory scheme does not contain provisions to allow a reported child victim to seek review of an investigative determination or to even be notified of such a finding.[247] The regulations therefore failed to provide due process for a child victim to challenge an unfounded report.[248] In addition, the minor was further deprived of due process where the challenge to the determination resulted in no change.[249] The court concluded that Daniel was "not afforded due process to enforce his rights to be protected."[250]

Following the alleged abuse by his father, the local police and SCR were notified.[251] The local child protection service investigated the incident with a resultant determination of

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[245] *Id.* at 621, 660 N.Y.S.2d at 290. *See* N.Y. C.P.L.R. 7801 (McKinney 1994). Article 78 provides:

> Except where otherwise provided by law, a proceeding under this article shall not be used to challenge a determination: 1. which is not final or can be adequately reviewed by appeal to a court or to some other body or officer or where the body or officer making the determination is expressly authorized by statute to rehear the matter upon the petitioner's application unless the determination to be reviewed was made upon a rehearing, or a rehearing has been denied, or the time within which the petitioner can procure a rehearing has elapsed . . . .

Id.

[246] *Daniel S.*, 172 Misc. 2d at 621, 660 N.Y.S.2d at 290. U.S. CONST. amend. V. This amendment states: "No person shall be . . . deprived of life, liberty, or property, without due process of law." *Id.* N.Y. CONST. art. I, § 6. This section provides, "No person shall be deprived of life, liberty, or property without due process of law." *Id.*

[247] *Daniel S.*, 172 Misc. 2d at 621, 660 N.Y.S.2d at 290.

[413] *Id.* at 630, 660 N.Y.S.2d at 295.

[249] *Id.* at 621, 660 N.Y.S.2d at 290.

[250] *Id.* at 630, 660 N.Y.S.2d at 295.

[251] *Id.* at 620, 660 N.Y.S.2d at 289.

"unfounded."[252] The "[u]nfounded" determination meant that "the investigation did not find some credible evidence of the alleged abuse or maltreatment."[253] SCR was notified of the unfounded determination pursuant to regulations,[254] and subsequently informed the father, the subject of this investigation, and the mother, the other named person in the report.[255] No other person was notified and, eventually, records of the report and investigation were expunged.[256] This was mandated by, and consistent with the statute and regulations.[257] Consequently, the child's mother filed a petition against the child's father asserting that the father committed a "family offense against the child," and a law guardian was appointed to represent the child.[258] Upon learning that the investigation of the child abuse report yielded an "unfounded determination," the guardian contacted the Buffalo regional office of the New York State Department of Social Services requesting an administrative review of this unfounded determination by the local district.[259] The review rendered no change in the determination, and the instant proceeding was filed

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[252] *Id.*

[253] *Id.* N.Y. COMP. CODES R. & REGS. tit. 18, § 432.1(f) provides: "*[u]nfounded report* means any report made, unless an investigation determines that some credible evidence of the alleged abuse or maltreatment exists." *Id.* (emphasis added).

[254] *Daniel S.*, 172 Misc. 2d at 620, 660 N.Y.S.2d at 289. N.Y. COMP. CODES R. & REGS. tit. 18, § 432.3(k) provides that the SCR should be notified if the determination is unfounded.

[255] *Daniel S.*, 172 Misc.2d at 620, 660 N.Y.S.2d at 289-90. N.Y. COMP. CODES R. & REGS. tit. 18, § 432.9(b) states that SCR will

> inform the subject(s) and other persons named in the report, except children under the age of 18 years, that the report was unfounded and he records of the report were sealed, or were expunged if the report had been received by the State Central Register of Child Abuse and Maltreatment prior to February 12, 1996.

Id.

[256] *Daniel S.*, 172 Misc. 2d at 620, 660 N.Y.S.2d at 290.

[257] *Id.* at 621, 660 N.Y.S.2d at 290. *See* N.Y. COMP. CODES R. & REGS. tit. 18, § 432.9.

[258] *Daniel S.*, 172 Misc. 2d at 621, 660 N.Y.S.2d at 290.

[259] *Id.*

on the child's behalf.[260] Daniel sought declaration that the regulatory provisions violated his due process rights by not providing meaningful review.[261] Daniel sought relief from the determination "at least to the extent of a due process review."[262] The court rejected respondent's argument that the court was without authority to issue a declaratory judgment in an Article 78 proceeding.[263] Therefore, the court was obligated to declare the rights of the parties.[264]

In the case of *In re Edwin L*,[265] the New York Court of Appeals applied a balancing test, as enunciated in *Matthews v. Eldridge*,[266] to determine whether adequate due process protections were afforded in a particular situation by the state.[267] The *Matthews* Court stated that "[d]ue process is flexible and calls for such procedural protections as the particular situation demands[,]" and "[a]ccordingly, resolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private

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[260] *Id.*

[261] *Id.*

[262] *Id.*

[263] *Id.*

[264] *Id.* In Allen v. Coombe, 225 A.D. 2d 1084, 639 N.Y.S.2d 197 (4th Dep't 1996), Muslim inmates brought an Article 78 petition contending that they were improperly restricted from practicing their religion in a correctional facility. *Id.* at 1084, 639 N.Y.S.2d at 197. The petition was denied by the lower court, but the appellate court modified this order, stating that even though this proceeding was brought pursuant to Article 78, the lower court should have declared the parties' rights. *Id.* at 1084, 639 N.Y.S.2d at 197-98.

[265] 88 N.Y.2d 593, 671 N.E.2d 1247, 648 N.Y.S.2d 850 (1996).

[266] 424 U.S. 319, 334-35 (1976). In *Mathews*, petitioner was notified of the possibility of termination of disability benefits which were, in fact, later terminated. *Id.* at 323-24. The issue presented was "whether the Due Process Clause of the Fifth Amendment requires that prior to the termination of Social Security disability benefit payments the recipient be afforded an opportunity for an evidentiary hearing." *Id.* at 323. The Court held that the administrative procedures undertaken comported with Due Process and an evidentiary hearing was not required prior to termination of such benefits. *Id.* at 349.

[267] *In re Edwin*, 88 N.Y.2d at 600, 671 N.E.2d at 1249-50, 648 N.Y.S.2d at 852-53; *Mathews*, 424 U.S. at 334-35.

interests that are affected."[268] The Court announced its balancing test by stating that

> [P]rior decisions indicate that due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[269]

In its analysis of the first prong of the Matthews test, the *Daniel S.* court found that the legislature recognized the private interest of adequately protecting children from abuse and neglect by their parents and other caretakers.[270] In doing so, the SCR was created and a procedure for reporting and investigating suspected child abuse and neglect was in place.[271] The court concluded that the private interests of the child will be affected by the regulatory scheme.[272]

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[268] *Id.* at 334-35 (citing Morrisey V. Brewer, 408 U.S. 471, 481 (1972) (other citations omitted).

[269] *Id.* at 334-35 (citations omitted).

[270] *Daniel S.*, 172 Misc. 2d at 622-23, 660 N.Y.S.2d at 291.

[271] *Daniel S.*, 172 Misc. 2d at 623, 660 N.Y.S.2d at 291. The legislative purpose clause of the Social Services Law, Section 411 stated:

> Abused and maltreated children in this state are in urgent need of an effective child protective service to prevent them from suffering further injury and impairment. It is the purpose of this title to encourage more complete reporting of suspected child abuse and maltreatment and to establish in each county of the state a child protective service capable of investigating such reports swiftly and competently and capable of providing protection for the child or children from further abuse or maltreatment and rehabilitative services for the child or children and the parents involved.

Id. (citation omitted).

[272] *Id.* at 622, 660 N.Y.S.2d at 291.

Analysis of the second prong of *Matthews* bears on whether the procedures challenged would create a risk of erroneous deprivation.[273] The *Daniel S.* court examined the number of cases referred by the SCR which resulted in unfounded determinations.[274] Six witnesses who worked in the system for many years at the local, regional or state level, testified that they were unfamiliar with a complaint about an unfounded report.[275] In addition, the court examined the provisions of the statutory/regulatory scheme to understand whether their testimony constituted "bureaucratic hubris, or stonewalling . . . or . . . an institutionalized mindset."[276]

Nothing in the statute provides for notice to a minor child victim, another person on the child's behalf, or the original reporter, of an unfounded determination.[277] The statute also does not provide for an objection or review of the unfounded determination on the child's behalf.[278] But, it does allow the alleged perpetrator to "challenge the 'indicated' determination and seek expungement of the records."[279] In contrast, the statutory scheme essentially treats the child as a non-entity, and in fact, respondent sought to dismiss the petition claiming the child lacked standing.[280] Although apparently a case of first impression

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[273] *Id.* at 623, 660 N.Y.S.2d at 291.

[274] *Id.* Evidence showed that 72.8% of all reports referred by the SCR resulted in unfounded determinations (approximately 94,000). *Id.* "In that year [1995], 128,896 cases of reported child abuse and neglect were referred for investigation. These cases involved 211,445 different children. In the first six years of this decade there have been over a half million unfounded investigations involving nearly one million children." *Id.*

[275] *Id.* at 623-24, 660 N.Y.S.2d at 291-92.

[276] *Id.* at 624, 660 N.Y.S.2d at 292.

[277] *Id.* at 624-25, 660 N.Y.S.2d at 292 (stating that only a mandated reporter who requested such notification is given notice). *See generally* N.Y. COMP. CODES R. & REGS tit. 18, § 432.12.

[278] *Daniel S.*, 172 Misc. 2d at 625, 660 N.Y.S.2d at 292.

[279] *Id.* N.Y. SOC. SERV. LAW (McKinney 1997). Section 422(8) provides that within ninety days, the subject can request that the report be amended upon an unfounded determination, and if such amendment does not occur, the subject is entitled to a "fair hearing" scheduled by the department. *Id.*

[445] *Daniel S.*, 172 Misc. 2d at 624, 660 N.Y.S.2d at 292.

legally and administratively, the *Daniel S.* court concluded that with no safeguards, the procedures challenged herein create a risk of erroneous deprivation of the child's right to protection which can be "ameliorated by additional or substitute procedural safeguards."[281]

In its analysis of the third prong of *Matthews,* to determine the procedural safeguards due, "the child's interest must be balanced against the governmental interest involved."[282] The interest identified by the government was cost, to the extent that it would be "prohibitively expensive" to grant review and hearing rights where there has been an unfounded determination.[283] Testimony from the SCR's Program Manager attempted to show that cases in which abuse was indicated amounted to only a third of unfounded cases, and therefore giving review rights to child victims would cost three times the expense of the same review rights to the perpetrators.[284] However, the court did not anticipate such a high challenge rate, and thus the evidence failed to establish that the governmental interest outweighs the abused child's private interest.[285] Since the statutory/regulatory scheme contains no provisions for the child "to obtain review of an unfounded determination or even receive notification thereof, the law in this State does not provide due process for a reported child victim to challenge the unfounding of a child abuse or neglect report."[286]

Relying on *Fuentes v. Shevin*,[287] the *Daniel S.* court established that the process due to child victims with unfounded reports, must

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[281] *Id.* at 624-25, 660 N.Y.S.2d at 292.

[282] *Id.* at 625, 660 N.Y.S.2d at 292-93. *See* Mathews v. Eldridge, 424 U.S. at 335.

[283] *Daniel S.*, 172 Misc. 2d at 625, 660 N.Y.S.2d at 293.

[284] *Id.* at 625-26, 660 N.Y.S.2d at 293.

[285] *Id.* at 626, 660 N.Y.S.2d at 293.

[286] *Id.*

[287] 407 U.S. 67 (1972). In *Fuentes*, suit was brought challenging the constitutionality of Florida and Pennsylvania replevin provisions which allowed for seizure of personal property without a hearing or notice to the other party. *Id.* at 69-71. The Court found that such seizures amount to a deprivation of property. *Id.* at 85. "[D]ue process is afforded only by the kinds of 'notice' and 'hearing' that are aimed at establishing the validity or at

include "prompt notice to the child and to the child's parents or custodian or guardian if other than the parents."[288] Since the parent or someone close to the parent is often the perpetrator, notice must be given to "an independent third person designated by law to act in the child's behalf, which representative would have the right to review the file which resulted in the unfounded determination."[289]

The *Daniel S.* court, relying on *Morrissey v. Brewer,*[290] also asserted that "due process further requires a review procedure should the child's representative wish to request review[,]" with such procedure providing "the opportunity to be heard in person and to present evidence to a neutral hearing body or officer" in a timely manner.[291] Abused children should have the same rights as those given to their alleged perpetrators.[292] Daniel S. had an advocate available to file a complaint against the determination which led to a review by the Buffalo regional office; respondent contends that this review was sufficient for due process requirements.[293] However, testimony revealed that the regional office had never received a similar complaint, and perhaps did not know how to deal with it since no departmental regulations existed.[294]

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least the probable validity, of the underlying claim against the alleged debtor *before* he can be deprived of his property . . . ." *Id.* at 97 (citations omitted).

[288] *Daniel S.*, 172 Misc. 2d at 626, 660 N.Y.S.2d at 293.

[289] *Id.* The court suggested the use of an ombudsman to meet this requirement. *Id.*

[290] 408 U.S. 471 (1972).

[291] *Daniel S.*, 172 Misc. 2d at 626, 660 N.Y.S.2d at 293 (citing Morrisey v. Brewer, 408 U.S. 471 (1972). In *Morrissey*, petitioners contended that they were deprived of due process by having their paroles revoked without a hearing. *Id.* at 472-73. The Court concluded that the minimum due process requirements should include written notice of the violations, disclosure of the evidence used, an opportunity to be heard, to be allowed to present and cross-examine witnesses, and a "neutral and detached" hearing body. *Id.* at 488-89).

[292] *Id.*

[293] *Id.* at 626-27, 660 N.Y.S.2d at 293.

[294] *Id.* at 627, 660 N.Y.S.2d at 293-94.

The request was finally reviewed only after the Law Guardian made several phone calls, and subsequently requested information pursuant to the Freedom of Information Act.[295] Although the Guardian expressed concern about "great potential for harm for the child[,]" no explanation was provided for the delay.[296] Additionally, although the regional office was aware that the determination was questioned, it acted in strict accordance with the statute and ensured that the record was expunged.[297] The Child Abuse Specialist did not verify any information or issues, did not discuss with the Law Guardian her reason for questioning the unfounded determination, and did not offer "an opportunity to be heard," thereby making this a "paper review" only.[253]

Respondent's final arguments suggested that the court should not take such precedential steps where the law has previously been changed to accommodate such events.[299] However, this only reflects their misunderstanding of *Elisa's Law* and the nature of this case.[300] The "child protection laws do not provide as much protection for victims of child abuse and neglect as is provided for adult victims of intrafamilial domestic abuse . . . ."[301]

While humanitarian considerations and public concern require the provision of a system to protect child abuse victims,[302] the current statutory scheme peremptorily denies child abuse victims the protections of the law.[303] The evidence indicated that "the

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[295] *Id.* at 627, 660 N.Y.S.2d at 294.

[296] *Id.*

[297] *Id.*

[298] *Id.* at 627-28, 660 N.Y.S.2d at 294.

[299] *Id.* at 628, 660 N.Y.S.2d at 294.

[300] *Id.* Although Elisa's Law provides for some third party oversight where services are provided to children, it does not provide notification to the reported child victim of an unfounded determination, nor of a review procedure. *Id.* 1996 N.Y. Laws ch. 12, § 5959-A (1996) provides that *Elisa's Law* is an Act "to amend the social services law, the domestic relations law, the family court act and the mental hygiene law, in relation to disclosure of information in the statewide central register of child abuse and maltreatment and disclosure of reports investigating the deaths of certain children." *Id.*

[301] *Id.*

[302] *Id.* at 629, 660 N.Y.S.2d at 295.

[303] *Id.* at 628-29, 660 N.Y.S.2d at 294-95.

State created a system where nearly three quarters of accepted reported cases are unfounded, thus resulting in no protective services."[304] Even though the number of children effected is almost one million, no provision for review exists on the victim's behalf, nor has there ever been such a request for a review.[305] Clearly, there was no system for regular monitoring, and even when undertaken, it was "infrequent and minuscule" with no "established procedures or protocol for assessing the validity of unfounded cases[.]"[306] Due process is not afforded when large numbers of child abuse and neglect cases are accepted for investigation, determined to be unfounded, but no review process is provided by the State for the child victim.[307]

The United States Supreme Court has set forth as guidance three factors to be considered when addressing issues of due process.[308] These are the private interest that would be affected by official action, the "risk of erroneous deprivation of such interest through the procedures used," and any additional safeguards; and "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional" safeguards would entail.[309] Relying on a due process analysis set forth by the United States Supreme Court, the *Daniel S.* court concluded that Daniel was not provided due process to exercise his right of protection from abuse.

> The report of the New York State Commission on Child Abuse indicates that in 1995 55 percent of child abuse and neglect reports to the SCR were not registered (accepted) and that 72.8 percent of those accepted were unfounded. Therefore, only 12.5 percent of reported cases became eligible for protective services.

Id. at 628-29, 660 N.Y.S.2d at 295.

[469] *Id.* at 628, 660 N.Y.S.2d at 294-95.

[305] *Id.*

[306] *Id.*

[307] *Id.* at 629-30, 660 N.Y.S.2d at 295.

[308] Matthews v. Eldridge, 424 U.S. 319, 334-35 (1976).

[309] *Id.* at 335.